UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OSWER Directive 9200.1-31P

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Interim Guidance in Response to the OIG Audit "Superfund Sites Deferred to RCRA"

FROM: Stephen D. Luftig, Director
Office of Emergency and Remedial Response

Elizabeth Cotsworth, Director
Office of Solid Waste

TO: Superfund National Policy Managers
RCRA Senior Policy Managers
CERCLA/RCRA Regional Counsels

PURPOSE:

The purpose of this memorandum is to provide interim guidance to Regional Superfund and Resource Conservation and Recovery Act (RCRA) programs on reevaluating and setting priorities within the universe of sites that were the subject of a recent Office of Inspector General (OIG) audit, "Superfund Sites Deferred to RCRA" (E1SFF8-11-0006-9100116, March 31, 1999). This guidance is designed to implement national policy on these issues and does not substitute for RCRA, CERCLA or EPA's regulations; nor is it a regulation itself. Thus, it cannot impose legally-binding requirements on EPA, and may not apply to a particular situation based upon the circumstances.

BACKGROUND:

On March 31, 1999, the OIG released an audit report entitled "Superfund Sites Deferred to RCRA," which assessed EPA's implementation of its RCRA deferral policy. Under this policy, EPA defers eligible Superfund sites to RCRA corrective action according to specific criteria. The original deferral policy (including criteria for deferral) may be found at 48 FR 40658 (September 8, 1983); the current deferral policy and a summary of all previous revisions

may be found at 54 FR 41004 (October 4, 1989) (See Attachment I for excerpt). **The OIG concluded that, out of nearly 3,000 sites deferred to RCRA, a large portion did not meet deferral criteria and were therefore inappropriately deferred. Furthermore, a number of the facilities were not found in the RCRIS database and will therefore need additional attention in order to clarify their current status and address them appropriately.**

The OIG based its results on a random sample of the deferred sites in Regions 2, 3, 5 and 9; therefore, the actual number of inappropriately deferred sites is unknown at this time. The OIG recommended that the Office of Solid Waste and Emergency Response reevaluate all of the deferred sites not in the RCRA corrective action workload to determine the best legal authority to address the sites, identify any response actions necessary at the sites, and improve communication between Superfund and RCRA program officials. The full text of the OIG's recommendations is included as Attachment II.

In the paragraphs below, we provide guidance on how Regions should assess this universe of sites/facilities. Most Regions have already made significant progress in their assessments, and we have worked closely with Regional staff in developing this guidance. However, we consider this guidance to be interim, and we will continue to work with you and your staff to ensure that any issues that arise in the course of your assessments are promptly addressed, and that the Agency can complete the process expeditiously.

IMPLEMENTATION:

The OIG found that 1,846 of 2,941 sites deferred to RCRA were not in the corrective action workload or were not subject to RCRA corrective action. As a result, the OIG concluded that many were ineligible for deferral under the current policy. Because the OIG studied only a subset of this universe, it is necessary for Regional Superfund and RCRA programs to review all of the 1,846 sites/facilities in order to assess the need for any response actions and determine the most appropriate authority for such actions. It is essential for representatives from both programs to contribute to these initial assessment efforts, while also working closely with the States.

Review and Assessment

These 1,846 sites/facilities must first be reviewed to determine their current status in each program. Representatives from both programs should work together to compare this universe to the RCRA Corrective Action Workload universe. The RCRA program will maintain responsibility for all deferred sites/facilities found in this universe, as these facilities either have undergone, or are currently undergoing corrective action, or will be in the future due to RCRA permitting requirements. If deferred facilities that are not in the CA Workload Universe have been acknowledged by the RCRA CA program as likely to be addressed by RCRA CA in the future (see Attachment III), then these facilities will (with proper documentation) remain deferred to the RCRA program.

Sites not being addressed under RCRA will return to the Superfund program for reassessment. While Superfund will have the lead in determining appropriate responses at these sites, both programs should continue to work together in order to compile the most recent site information prior to making a decision on how to address each site. In many situations, State files will also be an excellent resource in evaluating the current status of a site. Each site may require a different type or level of reassessment, depending on past assessment activities, preliminary Hazard Ranking System (HRS) scores, or response actions taken by other parties. File reviews should be performed at all sites to separate those which need further assessment from those which require only database updates to reflect their current status. Please refer to the coding instructions for the new "Other Cleanup Activity" action and "Non-NPL Status" field in Appendix A of EPA's Superfund/Oil Program Implementation Manual (OSWER Directive 9200.3-14-1E-P) and the CERCLIS/WasteLAN Coding Guidance Manual for detailed guidelines on updating site information in the CERCLIS database.

Sites which are appropriate for a NFRAP (No Further Response Action Planned) designation should be coded in CERCLIS accordingly. Those sites scored under the original HRS should be reevaluated in light of the revised HRS to ensure that the most appropriate assessment decisions are made at every site. At sites which have been archived from CERCLIS, information should be collected to ensure that the archive decision is still valid in light of the OIG's recommendations. The OIG found that nearly three-quarters of the deferred sites have been archived from the CERCLIS inventory based on a decision that no further federal Superfund interest exists. These sites need not be returned to the active CERCLIS inventory unless information reveals that further Superfund assessment or response activities, including removal actions, are necessary.

The OIG also identified 253 sites/facilities which were not readily located in the RCRIS database. Upon further investigation, the OIG was able to locate some of the randomly sampled facilities in RCRIS under different facility names or identification numbers. However, the OIG concluded that many of these sites were appropriately excluded from RCRIS because they were not regulated under RCRA. In fact, many of these sites were not intended to be deferred to the RCRA program. Some of these sites were deferred to States or another EPA program, but were coded into CERCLIS as deferred to RCRA because of limited options in the CERCLIS database. These 253 sites should be addressed in a process similar to the one described above; however, additional effort will be necessary during the preliminary stages in order to search for the site/facility in RCRIS and determine whether it was intended to be deferred to an authority other than RCRA. Specifically, CERCLIS sites being addressed under non-RCRA State cleanup programs should be assigned the new "Other Cleanup Activity" action in CERCLIS if no formal State-deferral agreement exists. Formal deferral agreements should be developed where possible.

Reporting Requirements

Documentation of site assessment decisions for the sites described above is an essential aspect of achieving the OIG's recommendations and ensuring that sites are appropriately addressed. CERCLIS will be the primary instrument for tracking the status of all the deferred sites during the course of the audit follow-up, and should reflect all decisions made at these sites in order to track our progress and report back to the OIG. When a site/facility has been appropriately deferred to RCRA, events at the site will be tracked in RCRIS. Site information should be updated immediately following all site decisions. Headquarters will pull data from CERCLIS quarterly, beginning March 31, 2000 to ensure that progress is being made in reviewing the universe of sites/facilities. The two programs should reach agreement on which program will take responsibility for each of the 2,099 sites/facilities by the end of Fiscal Year 2000. Although CERCLIS is maintained by the Superfund program, data entered into CERCLIS as a result of this guidance should reflect site decisions agreed to by both programs; the quarterly CERCLIS reports will be shared across programs as well.

Coordination for the Future

The OIG specifically cited "communication and collaboration between Superfund and RCRA regional officials" as one particular aspect of the deferral process that needs improvement. The OIG concluded that a lack of communication between program staff resulted in the inappropriate deferral of a large number of sites. Both Superfund and RCRA must work more closely to ensure that past deferrals are addressed appropriately, and that only eligible sites are deferred between programs in the future. These programmatic improvements need to take place on all levels, at Headquarters, in the Regions and in the States, in order to improve the overall deferral process.

At the Regional level, we expect that in the future the Superfund program will continue to identify candidates for deferral to the RCRA corrective action program. **However, any decision to defer a site will now require written notification to the receiving program.** The receiving program will then review its information on the site, as well as information supplied by the deferring program, prior to confirming that the site is appropriate for deferral. The receiving program must then notify the deferring program of its conclusion, in writing, and update each information system as appropriate. The site has not been officially deferred until the receiving program submits written acceptance of the site. The two programs should establish a time line for this approval process and follow up on the status of all pending deferrals, to ensure that a backlog of sites awaiting a deferral decision does not develop. This deferral process must be well documented in site files in both program offices.

Headquarters recommends that each program designate a site deferral coordinator as the point of contact for working with future sites. Establishing deferral coordinators in each program will also streamline the efforts in assessing the large universe of sites identified by the OIG and in determining the most appropriate authority to carry out any necessary response

actions. Further, Headquarters recommends that Regional staff of both programs maintain regular contact to discuss the status of sites that could potentially be deferred or that were recently deferred between programs. Close coordination between the programs will also facilitate discussions on how to best address the audit universe.

Finally, future efforts to improve cross-program coordination should include improvements to CERCLIS-RCRIS consistency. As stated earlier, the OIG identified more than 250 sites that were not readily located in the RCRIS database. A number of these sites were not in RCRIS and were never intended to be deferred to the RCRA program; these sites were coded incorrectly in CERCLIS as deferred to RCRA. A portion of these sites were later found in RCRIS under different facility names or identification numbers. Regional staff need to work together to identify and correct these common data errors which inhibit progress at these sites. Similarly, both programs should institute quality control procedures to ensure data is accurate for sites being entered into either system.

CONCLUSION:

Recognizing in advance that this effort will increase your assessment workload, we appreciate your efforts in ensuring that the OIG's recommendations are met and this universe of sites is properly assessed and referred to the appropriate program. Please factor this work into your Regional priorities for FY2000. OERR and OSW hope to eliminate the need for additional work on your part by tracking progress at the Headquarters level through the CERCLIS database.

If you or your staff have any questions, please contact Jennifer Griesert, Office of Emergency and Remedial Response, at (703) 603-8888 or Henry Schuver , Office of Solid Waste, at (703) 308-8656 .

Attachments

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Attachment I

Excerpt from **National Priorities List for Uncontrolled Hazardous Waste Sites - Final Rule Covering Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act** (commonly referred to as RCRA Deferral Policy), FEDERAL REGISTER, October 4, 1989, (54 FR 41004-41014); Section V which appears on 54 FR 41004-41006.

(and EPA's listing policies) and solicits public comments on the proposal. Based on these comments and further review by EPA, the Agency determines final HRS scores and places those sites that still qualify on the final NPL.

IV. Statutory Requirements and Listing Policies

CERCLA restricts EPA's authority to respond to certain categories of releases of hazardous substances, pollutants, or contaminants by expressly excluding some substances, such as petroleum, from the response program. In addition, CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases. For example, EPA has chosen not to list sites that result from contamination associated with facilities licensed by the Nuclear Regulatory Commission (NRC), on the grounds that the NRC has the authority and expertise to clean up releases from those facilities (48 FR 40661, September 8, 1983). Where other authorities exist, placing the site on the NPL for possible remedial action under CERCLA may not be appropriate. Therefore, EPA has chosen not to consider certain types of sites for the NPL even though CERCLA may provide authority to respond. If, however, the Agency later determines that sites not listed as a matter of policy are not being properly responded to, the Agency may place them on the NPL.

The listing policy of relevance to this final rule applies to sites subject to the corrective action authorities of RCRA Subtitle C.

V. Development of the NPL/RCRA Policy

Since the first NPL final rule (48 FR 40658, September 8, 1983) the Agency's policy has been to defer listing sites that could be addressed by the RCRA Subtitle C corrective action authorities, even though EPA has the statutory authority to list all RCRA sites that meet the NPL eligibility criterion (i.e., a score of 28.50 or greater under the HRS). Until 1984, RCRA corrective action authorities were limited to facilities with releases to ground water from surface impoundments, waste piles, land treatment areas, and landfills that received RCRA hazardous waste after July 26, 1982. Sites which met these criteria were listed only if they were abandoned or lacked sufficient resources. Subtitle C corrective action authorities could not be enforced, or a significant portion of the release came from nonregulated units.

On November 8, 1984, the Hazardous and Solid Waste Amendments (HSWA) were enacted. HWSA greatly expanded RCRA Subtitle C corrective action authorities as follows:

- Section 3004(u) requires permits issued after the enactment of HSWA to include corrective action for all releases of hazardous waste or constituents from solid waste management units at a treatment, storage, or disposal facility seeking a permit.
- Section 3004(v) requires corrective action to be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner/operator of the facility demonstrates that despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action.
- Section 3008(h) authorizes the Administrator of EPA to issue an order requiring corrective action or such other response measures as deemed necessary to protect human health or the environment whenever it is determined that there is or has been a release of hazardous waste into the environment from a facility with interim status.

As a result of the broadened Subtitle C corrective action authorities of HSWA, the Agency sought comment on a policy for deferring the listing of non-Federal sites subject to the Subtitle C corrective action authorities (50 FR 14117, April 10, 1985). Under the draft policy, the listing of such sites would be deferred unless and until the Agency determined that RCRA corrective action was not likely to succeed or occur promptly due to factors such as:

- The inability or unwillingness of the owner/operator to pay for addressing the contamination at the site.
- Inadequate financial responsibility guarantees to pay for such costs.
- EPA or State priorities for addressing RCRA sites.

The intent of the policy was to maximize the number of site responses achieved through the RCRA corrective action authorities, thus preserving the CERCLA Fund for sites for which no other authority is available. Federal facility sites were not considered in the development of the policy at that time because the NCP prohibited placing Federal facility sites on the NPL.

On June 10, 1986 (51 FR 21057), EPA announced components of a policy for the listing, or the deferral from listing, of several categories of non-Federal sites subject to the RCRA Subtitle C corrective action authorities. Under the policy, RCRA sites not subject to Subtitle C corrective action authorities would continue to be placed on the NPL. Examples of such sites include:

- Facilities that ceased treating, storing, or disposing of hazardous waste prior to November 19, 1980 (the effective date of Phase I of the RCRA regulations), and to which the RCRA corrective action or other authorities of Subtitle C cannot be applied.
- Sites at which only materials exempted from the statutory or regulatory definition of solid waste or hazardous waste were managed.
- RCRA hazardous waste handlers to which RCRA Subtitle C corrective action authorities do not apply, such as hazardous waste generators or transporters not required to have interim status or a final RCRA permit.

Further, the policy stated that certain RCRA sites at which Subtitle C corrective action authorities are available may also be listed if they meet the criterion for listing (i.e., an HRS score of 28.50 or greater) and they fall within one of the following categories:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action. Authorization to operate may be lost when issuance of a corrective action order under RCRA section 3008(h) terminates the interim status of a facility or when the interim status of the facility is terminated as a result of a permit denial under RCRA section 3005(c). Also, authorization to operate is lost through operation of RCRA section 3005(e)(2) when an owner or operator of a land disposal facility did not certify compliance with applicable ground water monitoring and financial responsibility requirements and submit a Part B permit application by November 8, 1985—also known in HSWA as the Loss of Interim Status Provision (LOIS)].
- Facilities that have not lost authorization to operate, but which have a clear history of unwillingness. These situations are determined on a case-by-case basis.
- On June 24, 1988 (53 FR 23978) EPA amended the June 10, 1986 policy (51 FR 21057) to include four additional categories of RCRA sites as appropriate for the NPL. These categories are:
  - Non- or late filers.
  - Converters.
  - Protective filers.
  - Sites holding permits issued before the enactment of HSWA.

In that same June 24, 1988 notice, the Agency proposed to add 13 sites to the NPL on the basis of the amended NPL/RCRA policy, and to drop 30 sites from the proposed NPL because they were subject to the Subtitle C corrective action authorities of RCRA and did not, at the time, appear to fall into one of the categories of RCRA facilities that EPA considers appropriate for listing under the current policy. In addition, in a separate Federal Register notice on the same date (53 FR 23988), the Agency proposed Update #7, which included a number of RCRA sites for listing under the NPL/RCRA policy. Nine of these sites are being added to the NPL in today's final rule. Also, on May 5, 1989 (54 FR 19526), the Agency proposed Update #8, which included 10 sites. One of these sites, a RCRA site, received no comment and is being added to the NPL in today's final rule.

Unwillingness Criteria

As part of the NPL/RCRA policy announced on June 10, 1986 (51 FR 21059), EPA explained its policy of listing RCRA sites where the owner/operator has demonstrated an unwillingness to take corrective action. The policy stated that, as a general matter, EPA prefers using available RCRA enforcement or permitting authorities to require corrective action by the owner/operator at RCRA sites because this helps to conserve CERCLA resources for sites with no financially viable owner/operator. However, when the Agency determines that a RCRA facility owner/operator is unwilling to carry out corrective action directed by EPA or a State pursuant to a RCRA order or permit, there is little assurance that releases will be addressed in a timely manner under a RCRA order or permit. Therefore, such facilities should be listed in order to make CERCLA resources available expeditiously. Under the policy, RCRA facilities will be placed on the NPL when owners/operators are found to be unwilling based on a case-by-case determination.

Several RCRA facilities being finalized in this rule were proposed for the NPL based upon their HRS scores and EPA's case-by-case determination that the owner/operators were unwilling to take corrective action. For each such site, the Agency has prepared a lengthy memorandum to the record, documenting the actions (or failures to act) upon which the unwillingness finding was based. EPA solicited comment on the listing of these sites (and on the findings of unwillingness), and is responding to comment here and in the accompanying support document. EPA believes that the sites are appropriate for the NPL. On August 9, 1988 (53 FR 30005), EPA added objective criteria to its policy for determining unwillingness. Specifically, a RCRA facility would be placed on the NPL based on unwillingness when the owner/operators are not in compliance with one or more of the following:

- Federal or substantially equivalent State unilateral administrative order requiring corrective action, after the facility owner/operator has exhausted administrative due process rights
- Federal or substantially equivalent State unilateral administrative order requiring corrective action, if the facility owner/operator did not pursue administrative due process rights within the specified time period
- Initial Federal or State preliminary injunction or other judicial order requiring corrective action
- Federal or State RCRA permit condition requiring corrective action after the facility owner/operator has exhausted administrative due process rights.
- Final Federal or State consent decree or administrative order on consent requiring corrective action, after the exhaustion of any dispute resolution procedures

However, the Agency explained it would be both unnecessary and inappropriate to go back and reexamine already proposed sites based on the revised criteria. First, the revised criteria had not been announced when the sites in this rule were evaluated for unwillingness and proposed for the NPL. Second, the new criteria do not represent a substantive change, but rather, an attempt at developing more easily applied and understood objective crtieria. EPA believes that the determinations of unwillingness made for the sites in this rule fully satisfy the Agency's policy and goals. Third, the Agency recognized that some lead time would be necessary for the Regions and States to apply the new criteria to sites before submitting them for proposal to the NPL; specifically, the Regions and States would be required to issue corrective action orders at RCRA sites before determining unwillingness, rather than evaluating all evidence on a case-by-case basis. Thus, the Agency decided to apply the new criteria only to sites proposed after August 9, 1988, so as not to significantly and unneccessarily delay promulgation and response action at already proposed sites.

Amended NPL/RCRA Policy

On June 24, 1988 (53 FR 23978), the Agency amended its NPL/RCRA policy by adding four categories of RCRA sites appropriate for listing.

(1) *Non- or late Filers:* Facilities that were treating storing or disposing of Subtitle C hazardous waste after November 19, 1980, and did not file a Part A RCRA permit application by that date and have little or no history of compliance with RCRA.

The Agency decided to place on the NPL "non- or late filers" based on the finding that RCRA treatment, storage or disposal facilities ("TSDFs") that fail to file Part A of the RCRA permit application generally remain outside the range of cognizance of authorities responsible for compliance with RCRA, and generally are without the institutional mechanisms, such as ground water monitoring programs, necessary to assure prompt compliance with the standards and goals of the RCRA program. Therefore, EPA believes that it is not appropriate to defer to RCRA for action at these sites, even though RCRA technically may apply. However, in cases where non- or late filer facilities have in fact come within the RCRA system and demonstrated a history of compliance with RCRA regulations (as may be the case with late filers), the Agency may decide to defer listing and allow RCRA to continue to address problems at the site.

(2) *Converters:* Facilities that at one time were treating or storing RCRA Subtitle C hazardous waste but have since converted to an activity for which interim status is not required (e.g., generators who store hazardous waste for 90 days or less). These facilities, the withdrawal of whose Part A application has been acknowledged by EPA or the State, are referred to as converters.

Converters at one time treated or stored Subtitle C hazardous waste and were required to obtain interim status. EPA believes that under RCRA section 3008(h) it can compel corrective action at such sites. However, RCRA's corrective action program currently focuses on TSDFs subject to permitting requirements, and thus EPA has not routinely reviewed converters under RCRA Subtitle C. EPA has decided that the deferral of this category of sites is not appropriate, as these sites are not currently engaged in treatment, storage, or disposal activities subject to RCRA permitting and they are not a priority for prompt corrective action under RCRA. Instead, the Agency has decided to list such sites to make full CERCLA resources and authorities available, if necessary. In cases where a converter has agreed to corrective action under a RCRA unilateral or consent corrective action order, the Agency will generally defer listing and allow RCRA to continue to address problems at the site.

EPA is currently prioritizing RCRA facilities for corrective action. If the

Agency determines that converter sites will in the future be addressed in an expeditious manner by RCRA authorities, then it will reconsider the listing policy for RCRA converter sites and may defer converters to RCRA for corrective action.

(3) *Protective Filers:* Facilities that have filed RCRA Part A permit applications for treatment, storage, or disposal of Subtitle C hazardous waste as a precautionary measure only. These facilities may be generators, transporters, or recyclers of hazardous wastes, and are not subject to Subtitle C corrective action authorities.

These facilities filed RCRA Part A permit applications as TSDFs as a precautionary measure only, and are generators, transporters, or recyclers of hazardous wastes. Protective filers are not subject to Subtitle C corrective action authorities, and thus, EPA has decided to place them on the NPL in order to make full CERCLA resources and authorities available.

(4) *Pre-HSWA Permittees:* Facilities with RCRA permits for the treatment, storage, or disposal of Subtitle C hazardous waste that were issued prior to the enactment of HSWA, and whose owner/operator will not voluntarily consent to the reissuance of their permit to include corrective action requirements.

For facilities with permits that pre-date HSWA, the owner/operators are not required through the permit to perform corrective action for releases from solid waste management units, and the Agency does not have the authority to modify such pre-HSWA permits to include facility-wide RCRA corrective action under RCRA section 3004(u) until the permit is reissued. Because many pre-HSWA permits are for 10 years, with the last pre-HSWA permit having been issued prior to November 8, 1984, it could be 1994 before the Agency could reissue some permits to include corrective action requirements. Therefore, the Agency has decided to list RCRA facilities with pre-HSWA permits (that have HRS scores of at least 28.50, or are otherwise eligible for listing), so that CERCLA authorities will be available to more expeditiously address any releases at such sites. However, if the permitted facility consents to the reissuance of its pre-HSWA permit to include corrective action requirements, the Agency will consider not adding the facility to the NPL.

Financial Inability to Pay

On August 9, 1988 (53 FR 30002), EPA solicited comment on amendments to the NPL/RCRA policy concerning the inability of an owner/operator to pay for cleanup at a RCRA-regulated site. The Agency received a number of comments on the amendments under consideration, but has made no final decision concerning these issues. The Agency will respond to comments and announce its decision on this policy in the future.

VI. Response to Public Comments

The Agency received a number of comments on the June 24, 1988 amendments to the NPL/RCRA policy, and on the application of those amendments and the June 10, 1986 NPL/RCRA policy to sites proposed for the NPL. Responses to the significant comments concerning the general application of the amended criteria are summarized below. All site-specific comments are summarized and responded to in the support document accompanying this rule, which is available in the Superfund dockets.

VI.a. Support for the Policy

A number of commenters supported the policy to drop sites from the NPL that can be adequately addressed under the corrective action authorities of RCRA Subtitle C. One commenter supported EPA's ability to initiate short-term emergency actions at RCRA sites. Another commenter supported the planned use of RCRA authority whenever possible, since the use of RCRA authorities "avoids the administrative complexity and unneeded political burden of NPL listing."

In response, the Agency notes that its decision to defer certain sites subject to the RCRA Subtitle C corrective action authorities is based on the ability of those authorities to achieve cleanup at a site and to preserve CERCLA resources for use at other sites.

VI.b. Opposition to the Policy

A number of commenters opposed dropping RCRA sites from the proposed NPL, transferring the sites from CERCLA to RCRA authorities, on the grounds that Superfund authorities are more protective of human health and the environment than are RCRA authorities. One commenter stated that Superfund cleanup standards are more stringent than RCRA's. The commenter noted that CERCLA requires permanent treatment to the maximum extent feasible, whereas RCRA does not. The commenter added that the RCRA program does not include cleanup guidelines similar to those under Superfund. Another commenter stated that CERCLA offers more remedial options than RCRA.

In response, both statutes require that remedies employed protect human health and the environment. The Agency intends for the two programs to provide similar cleanup solutions for similar environmental problems, even if procedural requirements differ. Indeed, one of the Agency's primary objectives in development of the RCRA corrective action regulations is to achieve substantive consistency with the CERCLA remedial program.

The NPL/RCRA policy is based on efficient allocation of limited CERCLA resources. Although CERCLA provides authority to clean up all sites, including RCRA sites, using CERCLA in all cases would be inefficient because RCRA has authority to conduct certain cleanup actions. Corrective action provisions are now required in RCRA permits, which direct activities at the site, often long after cleanup actions are completed. By deferring to RCRA, more sites are addressed, and the overall goals of both statutes are advanced.

Two commenters opposed transferring sites from CERCLA to RCRA authorities, maintaining that enforcement oversight is greater under CERCLA than RCRA.

In response, EPA believes the RCRA program assures adequate oversight. RCRA orders and permits establish oversight on a site-by-site basis. If a remedial action is extremely complex or the owner/operator is not fully cooperative, EPA may provide extensive oversight. In other cases, extensive oversight is not necessary. In any event, EPA inspection requirements apply to all sites under RCRA corrective action authorities. Under RCRA, States may be authorized to operate a hazardous waste program in lieu of the Federal program. Consequently, in many cases States provide oversight (RCRA section 3006).

One commenter opposed the policy to drop RCRA sites from the NPL because RCRA was not intended as a cleanup bill.

In response, the Agency disagrees. As discussed earlier, HSWA greatly expanded Subtitle C corrective action authorities, and EPA believes a complete cleanup can be achieved under RCRA. As the House Committee on Energy and Commerce noted in its report on HSWA:

> Unless all hazardous constituent releases from solid waste managment units at permitted facilities are addressed and cleaned up the Committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program with little prospect for control or cleanup. The responsibility to control such releases lies with the facility owner and operator and should not be shifted to the Superfund program, particularly when a final [RCRA] permit has been requested by the

Attachment II

OIG Audit Recommendations from "Superfund Sites Deferred to RCRA"

2-1. Develop a method and procedures for EPA regions and the states to use to evaluate deferrals not in the RCRA corrective action workload, but which may pose risk to human health and the environment. (Note: Recommendations 3-1, 4-4, 4-6, and 4-7 should be considered when developing the method and procedures.)

3-1. In cooperation with the states, assess the sites that were inappropriate for deferral. Develop criteria to determine which of them will be evaluated, update site characterizations, prioritize the sites, and identify the best legal authority and available resources to effect cleanup.

3-2. Reemphasize the need for communication and collaboration between Superfund and RCRA regional officials prior to deferring sites from one program to another. Restate the criteria for deferring sites, and require regions to maintain written documentation (for example, the deferral checklist) which shows that the decision to defer has been agreed to by both programs. Sites should not be considered deferred, or coded as such in respective information systems, until written acceptance of the proposed deferral(s) by the receiving program is obtained.

4-1. Add a code in CERCLIS for deferring sites to other EPA programs.

4-2. Change the status of the 13 sites with low HRS scores in CERCLIS to reflect the NFRAP designation rather than deferral to RCRA.

4-3. Revise CERCLIS to reflect the appropriate status of the 14 sites scoring equal to or above 28.5 in the HRS that were incorrectly coded as deferred to RCRA.

4-4. Delay archiving sites until OSWER develops a policy to determine whether state or tribal cleanups are adequate. Include as a prerequisite to archiving, a requirement for five-year reviews or some comparable process for sites where hazardous substances have been left on site so protectiveness of remedies can be assured over the long term.

4-5. Enter into written agreements when sites of federal interest are deferred to states.

4-6. Determine whether the sites that were not scored but were deferred to states merit federal interest, and proceed with recommendation 4-2 or 4-3 and 4-4 and 4-5 as appropriate.

4-7. Determine the appropriateness of the deferral (see Chapter 2 for guidance and discussion) for the 58 status unknown sites. After coordination with RCRA and state officials, either defer and update RCRIS accordingly, assess for potential listing on the NPL, or retain and monitor state cleanup progress in CERCLIS.

4-8. Adjust the active/archived status in CERCLIS as necessary.

Attachment III

Impact of OSWER response to OIG audit of "Superfund Sites Deferred to RCRA" on RCRA Corrective Action Program and Staff

In order to assist the Superfund program in addressing the OIG's recommendations, the RCRA Corrective Action (CA) program must carefully focus its efforts.

The RCRA CA program has twice analyzed and reported to the Superfund program the approximately 800 facilities, out of the nearly 3,000 deferred (from CERCLIS2 and CERCLIS3), that are in the CA Workload Universe in RCRIS. Facilities in the CA Workload are either being addressed by the RCRA CA program currently (with RFI Imposed) or will be in the future due to RCRA permitting requirements, and for the purposes of responding to this audit should be considered to have been properly deferred from CERCLIS.

To further assist the Superfund program in responding to the OIG's recommendations and fulfilling the RCRA CA program's role in the deferral process the EPA's Regional offices of the RCRA CA program should be ready to review those facilities that the Superfund program believes should be in the CA Workload Universe (i.e., properly deferred). This may involve additional review of RCRIS for new identification numbers and/or names not previously supplied to the RCRA CA program.

However, for the purposes of responding to the OIG's recommendations, the RCRA CA program staff should not initiate reviews, in Federal or State files, for facilities that the CA program does not have evidence that they are in, or should be in, the CA Workload Universe. Individual EPA Regional or State offices of the RCRA CA program may assist the Superfund program by conducting reviews and accepting responsibility for additional individual facilities that are subject to Corrective Action (e.g., via 3008h, 7003 or other Orders) and that are intended to be addressed by RCRA CA in the future, when resources become available.

Acceptance of responsibility (by the RCRA CA program) for facilities deferred from CERCLIS that are not in the CA Workload Universe, but are subject to future Corrective Action should be documented (with written acceptance) as described above in this OSWER Directive.